Filed 12/8/08 Miura v. Eliseo CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUSSELL MIURA, Plaintiff and Appellant, v. JESSICA ELISEO, Defendant and Respondent.	G039154 (Super. Ct. No. 05CC13610) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Affirmed.

The Roberts Law Firm and Jeffrey T. Roberts for Plaintiff and Appellant.

Michael Maguire & Associates, Paul Kevin Wood and Kevin Richard Jolly for Defendant and Respondent.

Plaintiff Russell Miura sued defendant Jessica Eliseo for injuries arising out of a car accident. A jury found in defendant's favor and the trial court denied plaintiff's motion for judgment notwithstanding the verdict. Plaintiff appeals contending the trial court erroneously denied his motions in limine to exclude evidence of his prior workers' compensation claims and testimony by defendant's biomechanical expert. We agree with plaintiff's contention regarding the prior claims but conclude no prejudice occurred and reject his claims with respect to the biomechanical expert. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In January 2004, defendant was driving when she hit a car driven by plaintiff. The impact was minor. The only damage to plaintiff's car was scuff marks on the driver's side rear rim, which had a damage estimate of $1,180.47. The damage to defendant's car was also minor and consisted of a scuff on the glass covering her driver's side headlight. Defendant did not get a repair estimate and did not repair her car.

Although plaintiff did not exhibit injury immediately after the accident, he felt soreness in his back 15-20 minutes later and saw his family doctor the next day with complaints of back pain radiating into his buttocks. Plaintiff ultimately chose to undergo surgery rather than epidural pain injections because they had not been successful for his prior shoulder injuries.

Plaintiff sued defendant for negligence, ultimately seeking over $300,000. Defendant admitted liability prior to trial, but denied causing injury.

Before trial, plaintiff moved to exclude, as irrelevant and prejudicial, evidence regarding prior workers' compensation claims he made for injuries suffered while he worked for the U.S. Postal Service. Defendant opposed the motion on the grounds the jury was entitled to consider whether plaintiff's prior injuries contributed to his currently claimed disability and to show plaintiff's pattern of undergoing surgeries for

injury claims. The trial court denied the motion, stating "the issue of bias or common scheme o[r] plan is important and if this is the defense theory . . ." it did not feel it could exclude it. Regarding plaintiff's concern about having to prove his prior injuries legitimately required surgery, the court responded, "All of that would be, in effect, rebuttal . . . to their defense. So wait for them to do it before you bring in any corroborative evidence."

Plaintiff renewed his motion during trial before taking the stand. Although he acknowledged evidence of a prior act is admissible to show a causal connection to the present physical condition, plaintiff argued his previous claims for shoulder injuries were not probative because there was no evidence relating those claims to his current back injury. The court again denied the motion, noting that the evidence was not intended to show a propensity to be negligent but rather to show "this is something that was pursued, the back surgery was unnecessary, that the plaintiff knew it was unnecessary, but did it in order to pad his legal case, in order to . . . make money . . . ."

During direct examination by his own counsel, plaintiff testified he began working for the post office in November 1994. He injured his right rotator cuff in February 1995 and scheduled surgery, which was approved and paid for by the U.S. Department of Labor. He returned to work the following April and left six months later for surgery to his left rotator cuff, again paid for by the Department of Labor. He did not return to work at the post office. Subsequently, he had two more surgeries performed, one on each shoulder, that the Department of Labor also covered.

Plaintiff also moved to exclude the testimony of defense biomechanical expert Judson Welcher, contending (1) his opinion on force of impact failed the *Kelly/Frye* test (*People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013), now called the *Kelly* rule (*People v. Leahy* (1994) 8 Cal.4th 587, 591-592); (2) his opinion was based on unreliable evidence; and (3) his comparison of

accident forces to unrelated activities was irrelevant and prejudicial. The court denied the motion.

At trial Welcher testified he is a biomechanical engineer and an accredited traffic accident reconstructionist. He is a frequent lecturer and consultant with various entities, including developers of amusement attractions regarding impacts to the human body. He has experience both in the testing of, and reviewing data relating to, amusement attractions such as roller coasters and bumper cars, and has published papers on their safety. His analysis of bumper car attractions shows the rate of injury is low in light of the number of persons who ride them.

Having personally conducted numerous vehicle crash tests, including live instrumented occupants in a variety of vehicles, Welcher has compiled crash data over many years using accelerometers to measure the speed at which the collisions occur, which is compared to the resulting damage in order to measure the g-forces involved. He has personally been in 50 or so crashes as a human crash "test subject" with the object of quantifying the force of impact upon the human body, including how the body moves due to impact.

In researching the collision in this case, Welcher obtained the VIN of plaintiff's Ford sedan and decoded it to determine the specific safety features it possesses. He consulted various sources, including a computer program to determine the exterior and interior dimensions of the car, an appraisal guide for vehicle weights, an estimating guide for a breakdown of the parts involved in each car, aerial photographs of the scene, and at least 20 publications, including 19 peer-reviewed publications and a Consumer Reports article discussing low-speed bumper testing on defendant's car model, a Nissan 350 Z, which indicated the repair cost for an impact speed of 2.5 miles per hour to be $696. He also examined the documents in the case, such as medical records, photographs, discovery responses, and expert witness depositions.

Based on his research and review, Welcher determined plaintiff's vehicle was decelerated by forces of one to three miles per hour at the time of impact. Specifically, it was "moved primarily lateral[ly], with some forward deceleration . . . pushed slightly sideways and decelerated by about 1 to 3 miles an hour." According to him, such forces compare with "bumper car impacts" that are two to six times worse, i.e., six to seven miles per hour of deceleration. Bumping into someone at full walking speed produces a change in velocity of one and one-half to two miles an hour.

Welcher explained that because the accident involved a side-impact collision, any torsion would first manifest itself in the cervical spine, yet plaintiff did not complain of neck pain. Additionally, the sort of compression required for a lower back injury is usually due to vertical loading and not the left-right impact involved in this case. He concluded there was no expectation of a herniated lumbar disk.

By special verdict, the jury found defendant's negligence was not a substantial factor in causing harm to plaintiff. The court denied plaintiff's motion for a judgment notwithstanding the verdict.

DISCUSSION

1. Admission of Evidence of Prior Workers' Compensation Claims

Plaintiff contends the trial court erred in admitting evidence of his prior workers' compensation claims for shoulder injuries. He argues the claims were irrelevant to any issue in the case and should have been excluded under Evidence Code sections 786, 787, and 1101 (all further statutory references are to this code). We agree there was error but conclude it was not prejudicial.

"[S]ection 786 limits character-credibility evidence to honesty and veracity and their opposites because those are the only four traits relevant to that issue. [Citation.] With the exception of prior felony convictions . . ., section 787 prohibits the admission of

evidence of specific instances of a witness's conduct to attack his credibility when its only relevance is to establish a trait of his character. [Citation.]" (*Piscitelli v. The Salesian Society* (2008) 166 Cal.App.4th 1, 7-8, fn. omitted.) Here defendant sought to introduce, and the trial court admitted, the prior claims evidence not to prove a character trait of plaintiff but rather to establish the issues of bias and a common scheme or plan. (See *id*. at p. 8 [evidence admissible even if it violates § 787 where relevant to prove witness bias or improper motive].) If the evidence was admissible for that purpose, it is irrelevant whether it was improper under sections 786 and 787. (See *Continental Airlines, Inc. v. McDonnell Douglas Corp*. (1989) 216 Cal.App.3d 388, 412 ["if evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose"].)

The question remains, however, whether the evidence was admissible to show bias or a common scheme or plan. Section 1101, subdivision (a) precludes admission of certain character trait evidence to prove conduct on a specified occasion. Section 1011, subdivision (b) clarifies, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

Although plaintiff acknowledges evidence of prior conduct may be admitted in criminal trials to show a common scheme or plan, he argues "the comments to [section] 1101 make it clear that it is not applicable to civil cases[.]" The assertion lacks merit. The comments instead explain the reasons why evidence of character is excluded in civil cases. (Cal. Law Revision Com. com., reprinted at 29B pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 1101, p. 438.) Nothing in them precludes the use of section 1101 in civil cases. On the contrary, "[w]hile section 1101 usually arises in

criminal cases, the statute applies in civil cases as well. [Citations.]" (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 929, fn. 10.)

Nevertheless we agree with plaintiff that the evidence did not have the necessary similarity to properly be admitted under section 1101. "Evidence tending to establish a common plan or design should demonstrate '"not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 120.) The only similarities here were that in each of his prior workers' compensation cases, plaintiff made a claim for an injury, pursued surgery, and had it paid for by someone else, and sought to do the same thing in this case. The injuries claimed were different and arose under different situations.

Defendant contends the evidence was admissible under section 1101, subdivision (c), which states, "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." But defendant did not raise this point in her opposition or argument and the trial court never had a chance to consider or rule on it. "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

Nor did the court base its ruling on defendant's claim the prior injuries are relevant to plaintiff's pain and suffering. This theory is also problematic, as plaintiff argues, because no medical expert testified the shoulder injuries were related to his back injuries and even if so, defendant never explained why it was "necessary to introduce the prior claims rather than limit the evidence to the underlying shoulder injuries."

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [¶] (b) . . . the error or errors complained of resulted in a miscarriage of

justice." (Evid. Code, § 353.) In civil cases, a miscarriage of justice should be declared only when the court, "'"'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."' [Citation.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

Here, the evidence of his prior work claims was not prejudicial to plaintiff for the same reason it was not admissible, i.e., the "facts are too dissimilar from" the present case. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 808.) As plaintiff states, his "ten[-]year[-]old comp claims arose from shoulder injuries while doing physical labor at the Post Office and were accepted by the U.S. Department of Labor as work related. There is nothing similar to those claims and [his] back injury with a disc herniation following the auto accident with [defendant]." Because of the dissimilarity, it was "highly unlikely the evidence had any significant impact on the jury's verdict." (*Ibid*.)

Plaintiff maintains the evidence was prejudicial because of the media's attention to assertions of "frivolous lawsuits" and "[t]he social stigma associated with persons who are suspected of filing unjustified, frivolous, or excessive number of lawsuits . . . ." The problem with this argument, besides being unsupported and conclusory, is that plaintiff himself established his workers' compensation claims were not unjustified, frivolous, or excessive, as the Department of Labor accepted and paid for each one of his shoulder surgeries.

Unlike *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525 and *Lowenthal v. Motimer* (1954) 125 Cal.App.2d 636, 643, cited by plaintiff, this was not a close case. Plaintiff conceded the impact was minor and that the only damage to his car was scuff marks on the driver's side rear rim. Defendant's medical expert testified it was "extremely unlikely" the automobile accident caused plaintiff's herniated disk because (1) there was no evidence of "any torsion or twisting of

the spine to result in a tearing of the wall of the disk," and (2) patients of plaintiff's age commonly presented with herniated disks without a prior history of low back complaints. Although plaintiff's own doctor opined the accident caused the herniated disk, he acknowledged plaintiff had a "pre-existing degeneration of that disk" and that there was no twisting or compressing of the spine as would commonly cause a disk herniation. He also confirmed that plaintiff suffered from degenerative disk desiccation, hypertrophy, and bone spurs in his spine, which resulted from aging and arthritic changes that take a long time to progress and were present before the accident.

The resulting verdict of 10 to 2 in defendant's favor is considered "not particularly close" (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1055) and was rendered only two hours after the jury began deliberating. (Cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [where case has held deliberations of almost six hours indicate guilt issue not 'open and shut' and suggest erroneous admission of evidence is prejudicial, jury deliberation for 12 hours before returning guilty verdicts "demonstrate[es] . . . closeness"].) The jury did not request a rereading of any of the testimony, nor did it submit any questions to the court. Although it did ask for the written jury instructions, it rendered its verdict minutes after receiving them.

In his reply brief, plaintiff does not contest the minimal impact or his preexisting degenerative condition. And despite challenging defendant's assertion her expert testified the back surgery was not necessary, he does not explain how that shows prejudice. We conclude plaintiff failed to carry his burden of establishing the error was prejudicial. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

2. Biomechanical Expert's Testimony

Plaintiff argues the court should have excluded Welcher's testimony because it did not satisfy the *Kelly* rule. Under *Kelly*, the proponent of the evidence must establish in a trial court evidentiary hearing that: (1) the technique has "gained general

acceptance" in the field; (2) the witness testifying about the technique and its application is properly qualified as an expert; and (3) "correct scientific procedures were used in the particular case." (*Kelly*, *supra*, 17 Cal.3d at p. 30; *People v. Venegas* (1998) 18 Cal.4th 47, 78.)

Plaintiff does not challenge Welcher's qualifications as an expert. Rather he asserts Welcher's testimony fails the *Kelly* test because damage-based reconstruction is not "an accurate determiner of accident forces," Welcher relied on improper material, and comparisons between the accident and other activities were too dissimilar to be relevant. We address each in turn.

a. Damage-Based Reconstruction

According to plaintiff, "[e]ngineers specializing in accident reconstruction do not regard damage-based reconstruction as proper for accurately determining the forces involved in a particular collision." The only evidence he cites is an article by Brian McHenry, whom plaintiff refers to as "a noted and quoted accident reconstructionist, who provided reconstruction education and training to Mr. Welcher . . . ." But as defendant notes, plaintiff fails to show McHenry's views "express the 'general consensus' of the biomechanical engineering community."

Moreover, a reading of the article reveals it criticizes accident reconstruction based solely on damage to the vehicle, and stresses that reconstruction techniques should "use all available information," including photos and "scene and vehicle information." Here, Welcher did not rely solely on damage to the vehicle. Rather, he considered the dimensions, weights, and parts of the cars, aerial photographs of the scene, photographs of the cars, publications, medical records, discovery responses, and expert witness depositions. One of the publications he read was a Consumer Reports article discussing low-speed bumper testing on defendant's car model.

We are not persuaded by the New York trial court's decision in *Clemente v. Blumenberg* (1999) 183 Misc.2d 923, 705 N.Y.S.2d 792, which ruled that "[u]sing repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact is not a generally accepted method in any relevant field of engineering or under the laws of physics." (*Clemente v. Blumenberg*, *supra*, 183 Misc.2d at p. 934.) The engineer in that case acknowledged the methodology was one he had "developed which ha[d] not been scientifically tested," and when questioned by the court he claimed there was no literature supporting this method of calculating a change in velocity. (*Ibid*.) Here, Welcher's methodology is supported by the McHenry article cited by plaintiff.

b. Material Relied Upon by Welcher

Plaintiff contends Welcher improperly based his opinion on defendant's statement regarding the lack of damage to her car because without a damage estimate or a repair bill he was merely speculating about the lack of damage. The contention lacks merit. As defendant points out, "there could not be any 'estimate for [her] Nissan because there was no real damage to repair." (Italics omitted.) This fact was not speculative because it was confirmed by the photographs of both cars, plaintiff's concessions the impact was minor with the only damage to his car being scuff marks on the driver's side rear rim, and defendant's testimony that her vehicle had only a minor scratch on her headlight.

Plaintiff also argues Welcher improperly relied on "one-dimensional photographs" and repair estimates for his car. He asserts the photographs were grainy, showed only the surface of the car, and "[a] repair estimate is just that, an estimate of damage" whereas "[o]nly a repair bill following repairs truly reflects the items repaired on a damaged car." None of these factors make the data relied upon speculative or conjectural. On the contrary, they go toward the weight of the evidence, not its admissibility.

c. Comparisons to Other Activities

Plaintiff maintains Welcher's comparison of the accident to riding in bumper cars in an amusement park, bumping into someone while walking, and backing a car into a wall at "'half-walking speed'" were too dissimilar to be relevant. We disagree.

The only authority cited by plaintiff is the Colorado case of *Schultz v. Wells* (Colo.Ct.App. 2000) 13 P.3d 846. There the defendant tried to introduce a biomechanic's opinion that the forces of a traffic accident were similar to forces of daily human activity, such as stepping off a curb, jumping rope, coughing, lifting, and being hit in a bumper car. The trial court excluded the evidence, finding "the list of representational horizontal G-forces did not take into consideration the entire mechanical movement of a body during a car collision, in that it did not address forces from other directions and the position of the body at the time of the accident." (*Id*. at 852.) But in doing so, the court acknowledged the trial court had discretion in deciding whether to exclude relevant evidence that would confuse or mislead the jury. (*Ibid.*) The fact the court in that case did not abuse its discretion in excluding the evidence does not mean the court in this case abused its discretion in admitting it.

DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.